No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an employer can be liable under the religious-accommodation provision of Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if (a) the employer has actual knowledge of a religion-work conflict based on direct, explicit notice from the applicant or employee and (b) the religious observance or practice is "inflexible."

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

When Congress added a religious-accommodation requirement to Title VII in 1972, it recognized that religious freedom in the workplace is at least as important to most believers as freedom from government-imposed restrictions on religion. After all, many of the faithful will never feel the weight of the government impacting their religious lives, but nearly everyone needs a job.

Accordingly, Congress required that, where an employer can do so "without undue hardship on the conduct of [its] business," the employer must "reasonably accommodate ... all aspects" of an "employee's or prospective employee's religious observance or practice." 42 U.S.C. § 2000e(j). The statute thus makes it "unlawful" for an employer "to discharge any individual" or "to discriminate against any individual with respect to," among other things, the "privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e-2(a)(1). As a result, Title VII prohibits employers from discriminating on the basis of religion—including an employee's need for a reasonable accommodation of a "religious observance or practice"—not just in their treatment of existing employees, but in hiring new employees.

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[1] No one (including a party or its counsel) other than the *amici curiae*, their members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. All counsel of record received timely notice pursuant to Rule 37.2 of *amici's* intent to file this brief, and all parties have consented to its filing in communications on file with the Clerk.

Unfortunately, the decision of the Tenth Circuit majority in this case would eviscerate these critical protections for religious freedom. First, as the EEOC's petition explains and the majority concedes, the panel's holding conflicts with other circuits by inventing a new requirement that, even if the employer has actual knowledge or notice of the need for a religious accommodation, that knowledge or notice doesn't "count" unless the employer has direct, explicit notice from the employee or applicant. That is so, moreover, even where an applicant doesn't yet know enough about the job to know an accommodation is needed—thereby creating a catch-22 for the religiously observant job seeker. Second, the majority erected a new, non-statutory requirement that the "religious observance or practice" at issue must be "inflexible" or mandatory, not just highly recommended or encouraged by the employee's religious beliefs.

Amici curiae are religious organizations—representing Christians, Jews, Muslims and Sikhs—that are deeply concerned about the impact of these two holdings on the ability of religiously observant job applicants to obtain and keep employment. From personal experience working with their members, *amici* know that the disparity between employer and employee is nowhere greater than during the hiring process. Frequently, an applicant will be unaware of a work-religion conflict simply because of her inferior knowledge of the employer's work requirements. And even if the applicant is aware of a potential conflict, hiring processes are often technologically structured in a way that precludes the employee from even raising the issue during the application process. The Tenth Circuit's approach creates an even greater incentive for employers to act as "ostriches"—remaining

willfully blind to the religious needs of employees and applicants alike.

Similarly, by allowing an employer to deny an accommodation based upon the perceived "flexibility" of a religious conviction, the Tenth Circuit's approach turns Title VII on its head. It provides religious convictions with even less protection than other, non-protected choices rather than providing the additional protections that Congress enacted to ensure respect for "*all* aspects" of an employee or applicant's "religious observance or practice, as well as belief." 42 U.S.C. § 2000e(j) (emphasis added).

For these reasons as well as those articulated by the EEOC, *amici* respectfully suggest that the Court should grant the EEOC's petition, and reverse the Tenth Circuit's decision.

STATEMENT

The case involves a young Muslim woman, Samantha Elauf, who was denied a job at an Abercrombie & Fitch store. The denial was based on an interview with a store official who, seeing she wore a headscarf, thought Ms. Elauf would likely require an accommodation of the store's "Look Policy," which prohibits headgear.

Over a vigorous dissent by Judge Ebel, the Tenth Circuit majority held that a job applicant who is rejected based on the employer's perception of a work-religion conflict cannot make a *prima facie* case under Title VII if, during the hiring process, a specific religious practice and resulting work-religion conflict were not expressly flagged by the potential employee herself—even if the employer was on notice of the potential conflict. See *E.E.O.C. v. Abercrombie & Fitch Stores*, Inc., 731 F.3d 1106, 1122-23 (10th Cir. 2013);

Pet. App. 28a-30a. Equally important, in reaching that conclusion, the Tenth Circuit held that an employer is required to accommodate a religious practice only if the potential employee views it as "inflexible"—that is, mandated rather than merely encouraged by the employee's religious beliefs. Id. at 23a-24a, 39a, 41a, 52a, 54a. Absent review and reversal by this Court, both holdings will govern the proceedings on remand in the district court in this case, and in future cases in the Tenth Circuit.

REASONS FOR GRANTING THE PETITION

The petition and Judge Ebel's dissent ably explain why the majority's holding on the "actual notice" point contravenes this Court's approach to addressing religious-discrimination claims such as those asserted by the EEOC and Ms. Elauf, and why the majority's approach conflicts with precedents from other circuits. But in addition to that circuit conflict, certiorari should be granted for two reasons: First, the question presented is of enormous practical importance to a wide array of believers from numerous religious traditions, and its importance increases daily as the nation grows more religiously diverse. Second, the Tenth Circuit's holdings—including its holding on the "inflexibility" point—are both legally erroneous and perverse.

I. The question presented is of immense practical importance.

Recent trends confirm the need to protect religious rights in the workplace. For example, charges of religion-based discrimination filed with the EEOC have

more than doubled over the last fifteen years,[2] even as the diversity of religious beliefs and practices has increased.[3] Moreover, while work-religion conflicts are common, they can almost always be accommodated without undue hardship as long as both employees and employers have an adequate incentive to undertake the necessary dialogue. That is true of conflicts arising from scheduling demands and those arising, as in this case, from appearance standards.

A. Sabbath and holy day observances frequently conflict with an employer's work schedule.

Conflicts between religious convictions and job duties frequently involve Sabbaths and holy days. See, *e.g.*, *Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Balint* v. *Carson City*, 180 F.3d 1047 (9th Cir. 1999); *Brown* v. *General Motors Corp*, 601 F.2d 956 (8th Cir. 1979). For example, Seventh-day Adventists, observant Jews and Seventh Day Baptists all observe Sabbath from sundown on Friday to sundown on Saturday. Other Christian groups hold

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[2] EEOC, Charge Statistics, FY1997 through FY2013, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last viewed Aug. 15, 2014).

[3] See Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey (2008) (available at http://religions. pewforum.org/pdf/report-religious-landscape-study-full.pdf) (last viewed Aug. 15, 2014) (finding that "the United States is on the verge of becoming a minority Protestant country ... Immigrants are also disproportionately represented among several world religions in the U.S., including Islam, Hinduism and Buddhism"); Gallup, Religion (2013) (available at http://www.gallup.com/poll/1690/religion.aspx) (last viewed Aug. 15, 2014) (finding just 41% of respondents to be Protestant).

similar beliefs on Sunday observance. Many Jews, Muslims, Christians and members of other faiths also observe holy days that sometimes occur during the business week.

While religious limitations on an employee's work schedule may not be as visible as the headscarf in this case, recent trends in employment applications indicate that this is a serious, although largely hidden, problem. Online recruiting and employment applications have exploded over the past decade.[4] And automated screening of online applications has become ever more prevalent.[5] But automated application processes create a serious problem for applicants whose religious practices create scheduling limitations by making it more difficult for such applicants to bring to an employer's attention the religious reasons for their scheduling limitations.

Unfortunately, the Tenth Circuit's reasoning gives the employer a perverse incentive to *deny* to religiously observant applicants any opportunity to discuss religion-based limitations on their appearance or scheduling. Under that reasoning, the employer's ignorance automatically defeats a prima facie case, and thus effectively eliminates Title VII's accommodation protections for those applicants. Under the Tenth

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[4] See Online Job Recruitment: Trends, Benefits, Outcomes and Implications, available at www.hr.com/en/communities/staffing_and_recruitment/online-job-recruitment-trends-benefits-outcomes-an_f70ogs0y.html (Sept. 25, 2007) (last viewed Aug. 15, 2014).

[5] See Recruiting Technology and Recruiting Software Trends 2013, available at www.recruiter.com/recruiting-technology-and-recruitingsoftware-trends.pdf (last viewed Aug. 15, 2014).

Circuit's position, then, observers of the Sabbath and other holy days will find themselves effectively excluded from a large and growing sector of the workforce that is hired through online applications.

Amici have received numerous troubling reports of online application systems that have precisely this effect. In those systems, once an applicant has completely filled out one of a series of pages, that page is submitted and the next page appears. During this process, a page generally inquires about the applicant's scheduling availability. If the applicant indicates any limitation, the response is not accepted and the applicant is unable to proceed further with the application—and therefore cannot be hired. Thus, a Sabbath-observer who does not indicate availability for work during her Sabbath is unable even to complete the application and is thus excluded from employment, even if a scheduling accommodation could be accomplished with little to no effort or cost to the employer.

The Tenth Circuit's decision effectively insulates such systems from any legal challenge under Title VII. And that means that many religiously observant job seekers will never even get to the interview stage of the hiring process.

B. Religiously motivated appearance frequently conflicts with an employer's "look" rules.

Another issue that often arises in the workplace concerns religious dress and appearance. Many Muslim women, like Ms. Elauf, believe that the Quran requires or at least encourages them to cover their heads in public. See, *e.g.*, *Kaukab* v. *Harris*, 2003 WL 21823752 (N.D. Ill. Aug. 6, 2003). Sikhs are likewise required to wear turbans and maintain uncut hair,

including beards. See, *e.g.*, *Bhatia* v. *Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984). And many Jews wear head coverings such as hats or yarmulkes. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

Appearance-related religious practices are also often found in various Christian denominations. Many Pentecostal women do not cut their hair and wear head coverings. And Christians of all denominations wear various forms of religious jewelry such as crosses or crucifixes, religious medals and evangelistic messages. See, *e.g.*, *Rivera* v. *Choice Courier Systems, Inc.*, 2004 WL 1444852 (S.D.N.Y. Jun. 25, 2004); *Hickey* v. *S.U.N.Y. at Stony Brook Hospital*, 2012 WL 3064170 (E.D.N.Y. Jul. 27, 2012).

Some of these religious practices are, by their nature, apparent during an interview. Frequently, accommodation is possible simply by modifying apparel in a manner that eliminates the conflict. However, such accommodation cannot be achieved unless the need for an accommodation is first identified and discussed. And here again, the Tenth Circuit's decision discourages such discussion because, under that decision, an employer can face liability based only on what the employee or applicant *herself* directly communicates to the employer, not on knowledge the employer might have received from other sources, including the employer's own observations.

In short, the majority's analysis is likely to have profound and far-reaching impacts on a wide variety of religiously observant employees and applicants. And it will too often force them to choose, unnecessarily, between a job and their faith.

II. The Tenth Circuit's holdings are as perverse as they are erroneous.

In ruling against Ms. Elauf, the Tenth Circuit relied upon two closely related legal holdings that are not only erroneous, they are perverse. One is the requirement that the employer have actual knowledge of the conflict, based upon information obtained directly from the employee. The other is the requirement that the religious practice at issue be mandatory. Both of these holdings are fairly included within the question presented in the petition, although *amici* respectfully suggest that the question be refined to include both points expressly.

A. The Tenth Circuit's "actual knowledge" requirement not only conflicts with rulings in other circuits, it also lacks any mooring in Title VII or this Court's decisions.

By itself, the Tenth Circuit's "actual knowledge" requirement would effectively gut Title VII's accommodation requirement.

1. One central problem with the Tenth Circuit's interpretation of Title VII is its holding that the only acceptable source of information concerning a work-religion conflict is the employee or applicant, regardless of all other information of which the employer is aware. See Pet. App. 29a-31a, 33a, 71a. Under that view, for example, Title VII is simply inapplicable unless Ms. Elauf *personally* utters certain (unspecified) statements establishing a work-religion conflict. Thus, even if Ms. Elauf had been accompanied to the job interview by her imam, who explained the Quranic requirement of the headscarf, the employer would still have no obligation under Title VII simply because that informat ion did not come directly from

Ms. Elauf. That is absurd, and it has no support in the language, history or interpretation of Title VII.[6]

Equally problematic is the Tenth Circuit's highly elevated threshold requiring "particularized, *actual* knowledge" of a specific work-religion conflict. Pet. App. 34a, 36a, 39a-41a, 43a. This elevated standard is likewise not found in the language or history of Title VII. And it runs counter to the purpose and goals of Title VII, which is designed "to assure equality of employment opportunities" regardless of religion. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276 (1982). This is especially true in the employment application context, in which an employer's knowledge of its own business and resulting job requirements is vastly superior to that of the applicant. How is an applicant supposed to identify every "particularized" work-religion conflict that might arise during an employment relationship that has not even yet begun?

2. As a result of these misinterpretations of Title VII, the Tenth Circuit's holding effectively permits an employer to ignore a work-religion conflict of which it is aware from a source other than the employee or applicant. That is perverse for at least three reasons.

First, it frustrates one of the key purposes of the accommodation requirement, which is to spur a dialogue between employer and employee on how best to

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[6] While formulations of the *prima facie* case frequently refer to notice by the employee, this is merely because that is the most common fact pattern. In the typical case, the work-religion conflict will be exposed as a matter of course by an employee who objects to a conflicting work requirement once she learns of it. The same cannot be said of potential conflicts with work rules that are known only to an employer during the hiring process.

meet the employer's objectives while satisfying the employee's religious desires. As this Court has put it, "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and ... the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986). Or, as the Eighth Circuit has suggested, the purpose of Title VII's accommodation process is to allow the "employer [to] have ... the chance to explain the [relevant] policy in relation to [the employee's] religious needs, and perhaps work out an arrangement satisfactory to both parties." *Johnson* v. *Angelica Uniform Group*, 762 F.2d 671, 673 (8th Cir. 1985).

Yet under the standard adopted by the Tenth Circuit, employers have a powerful incentive to *avoid* any meaningful interaction with applicants and ignore recognized conflicts rather than communicate about possible solutions. Employers may sit back, secure in the knowledge that if an employee seeks to enforce compliance with Title VII's accommodation requirement, the employer can stick its head in the sand and claim ignorance, since despite the employer's actual awareness of the conflict, the employee used no "magic words" to describe the need for accommodation. Such an approach defies both the purpose of Title VII and common sense. As the Ninth Circuit recognized when addressing this same issue in *Heller* v. *EBB Auto Co.*:

> A sensible approach would require only enough information about an employee's religious needs to permit the *employer* to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.

8 F.3d 1433, 1439 (9th Cir. 1993) (emphasis added); accord *Brown* v. *Polk County*, 61 F.3d 650, 654 (8th Cir. 1995); *Hellinger* v. *Eckerd Corp.*, 67 F. Supp.2d 1359, 1363-64 (S.D. Fla. 1999); *Hickey*, 2012 WL 3064170 at *7. With such information in hand, the employer and employee can then work out an accommodation that meets the needs of both. But such interactions obviously will not occur under a legal regime—like that articulated by the Tenth Circuit—that gives the potential employer a powerful incentive *not* to undertake that discussion during the hiring process.

Second, the Tenth Circuit's standard unfairly ignores the obvious information asymmetry between an employer and a job applicant. Surely, for example, an employer who sees an applicant wearing religious apparel will generally be in a better position than the applicant to determine whether it is likely to create a religion-work conflict in the employer's own workplace. And the employer's knowledge of that potential—gleaned from the interview itself—is certainly relevant in determining whether a disappointed applicant has established a prima facie case of religious discrimination.

The same is true of scheduling issues: If a potential employer learns during a job interview that an applicant holds beliefs that may create a scheduling issue, that knowledge too should be relevant in determining whether an employer that refused to hire such an applicant did so for reasons of religious discrimination. Yet the Tenth Circuit's holding makes it irrelevant, even for purposes of summary judgment.

The Tenth Circuit's requirement that the employee or applicant identify and articulate a specific, "par-

ticularized" conflict heightens the unfairness. It is often said that the majority of communication is non-verbal. See Albert Mehrabian, Silent Messages: Implicit Communication of Emotions and Attitudes (2nd ed. 1981). And a hyper-technical rule that requires a *verbal* communication of something that has already been effectively conveyed non-verbally is nonsensical and redundant. If the point of the accommodation process is to give the employer a chance to work out a satisfactory accommodation—as it is—that purpose will be served once the employer is aware of the conflict, even if the prospective employee is unable to articulate the conflict in a "particularized" fashion. See, *e.g.*, *Hellinger*, 67 F. Supp.2d at 1363-64.

To be sure, it is fair to expect the employee to inform the employer as soon as the employee learns that a conflict exists. But where the employee never learns of the conflict, there is not only no reason for the employee to provide this information, it is simply impossible. In that circumstance, as in this case, the employer may be the only party in a position to know whether it perceives a conflict between a work rule and a potential employee's religious belief or practice. And if that is true, it is unfair to place on the applicant the burden of discerning and articulating the conflict.

Third, the majority's approach threatens to cripple Title VII's protection against religious discrimination for a wide swath of job applications from the religiously observant. Because an employer is generally more aware of its own job requirements than a job applicant, the employer will usually be in a better position to determine whether a particular religious belief may create a religion-work conflict. But the Tenth Circuit's holding—that the employer's *own* in-

dependent knowledge or notice of an applicant's religious belief is irrelevant to the employee's *prima facie* case—would effectively deny protection to potential employees in all or virtually all such cases.

Indeed, by allowing an employer to act based solely upon a prospective employee's apparent religious conviction—in this case Ms. Elauf's apparent belief in the religious desirability of wearing a headscarf—without making any effort to find a reasonable accommodation, the Tenth Circuit's approach turns Title VII on its head. It results in religious convictions receiving even less protection than other non-protected choices, rather than enforcing the *additional* protections for religious belief that Congress wrote into Title VII. After all, this historic legislation was enacted to provide greater balance in the otherwise asymmetric relationship between employers and employees or applicants, not to somehow protect employers from the religious by placing even greater burdens on believers.

B. The Tenth Circuit's "inflexibility" holding is equally wrong and perverse, and should be expresaly reflected in the Question Presented.

The majority's "inflexibility" requirement also substantially weakens Title VII's accommodation regime—both in the job application context and more generally. Indeed, that requirement would discriminate in favor of adherents to religions that are more commandment-based, i.e., those replete with "thou shalt's" and "thou shalt not's," and against adherents of religions that eschew such absolutes. Similarly, the "inflexibility" requirement treats adherents of the same religion differently depending on the strictness with which they interpret the teachings of their faith.

Absent review and reversal by this Court, moreover, that requirement will govern further proceedings in the district court in this case and, indeed, in all other cases in the Tenth Circuit.

For four reasons, the majority's "inflexibility" requirement merits review. *First*, it is contrary to Title VII's intent and plain language. By its terms Title VII requires accommodation, where it can be done without undue burden, of "*all aspects* of religious observance and practice," not just "observances and practices" that may be considered mandatory. 42 U.S.C. § 2000e(j) (emphasis added). In other words, a religious "observance" or "practice" falls squarely within the accommodation requirement even if it is merely recommended, encouraged or even motivated by one's religious beliefs. To deny protection to such observances and practices is to eliminate much of the protection Title VII was intended to provide, and that its text explicitly provides.

Second, the majority's approach conflicts in principle with other circuits' interpretation of Title VII. In applying that statute, other circuits have merely required that the claimant have a religious belief that creates a conflict with employment duties and is either "bona fide," *Sanchez-Rodriguez* v. *AT & T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 12 (1st Cir. 2012); *Antoine* v. *First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013); *Peterson* v. *Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *Morrissette-Brown* v. *Mobile Informary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007), or "sincere"—and nothing more. *Webb* v. *City of Philadelphia*, 562 F.3d 256, 259 (3rd Cir. 2009); *Tepper* v. *Potter*, 505 F.3d 508, 514 (6th Cir. 2007); *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013); *Harrell* v. *Donahue*, 638

F.3d 975, 979 (8th Cir. 2011). Adding a requirement that the religious belief be "inflexible" or mandatory is thus at odds with the teachings of other circuits.

Third, the Tenth Circuit's decision also conflicts in principle with decisions of other circuits. For example, the Seventh Circuit explicitly rejected the logic of the Tenth Circuit's inflexible religious practice test when it noted in the context of a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") that "a religious believer who does more than he is strictly required to do is nevertheless exercising his religion." *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). As an illustration, the court noted that a "Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is performing a religious observance even though not a mandatory one." *Id.*[7] The D.C.,

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[7] Congress has specified that RLUIPA and the Religious Freedom Restoration Act on which it is based apply to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). That formulation shows that Congress itself views the plain meaning of "exercise of religion" as including religious beliefs that are neither central to nor compelled by any particular "system of religious belief." Given the broad and similar language of Title VII, there is no reason to believe Congress understood the term "religion" as defined there any differently. See also *Korte* v. *Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (noting that "the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that"); *Nelson* v. *Miller*, 570 F.3d 868, 878 (7th Cir. 2009) (noting under RLUIPA that "requiring a prisoner to show that his preferred diet is compelled by his religion [is] unlawful"); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is

Second and Eighth Circuits have similarly rejected an "inflexibility" or "mandatory" requirement as to claims directly under the Free Exercise Clause. See *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (holding that a "requirement that a religious practice be mandatory to warrant First Amendment protection finds no support in the cases of the Supreme Court or this court"); *Ford* v. *McGinnis*, 352 F.3d 582, 593 (2nd Cir. 2003) (same); *United States* v. *Means*, 858 F.2d 404, 407 (8th Cir. 1988) (test for religious burden is whether plaintiffs have been compelled to "refrain from religiously *motivated* conduct or to engage in conduct that they find objectionable for religious reasons.") (emphasis added).

Fourth, the Tenth Circuit's approach conflicts in principle with this Court's consistent teaching that putting courts in the position of having to choose which beliefs are "central" or mandatory on the one hand, and which are "peripheral" or "flexible" on the other, "cannot be squared with the Constitution or with our precedents, and...would cast the Judiciary in a role that we were never intended to play." *Lyng* v. *Nw. Indian Cemetary Protective Ass'n*, 485 U.S. 439, 458 (1988). Thus, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989). Accord *Employment Division* v. *Smith*, 494 U.S. 872, 886-887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion"). Indeed, as the Second

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claimed to be burdened be central to the adherent's religious belief system.").

Circuit put it in *Ford* v. *McGinnis*, *supra*, "To confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine." That too is a powerful reason to reject the Tenth Circuit's "inflexibility" rule.

* * * * *

The Tenth Circuit majority attempted to justify its conclusions on both the "actual knowledge" and "inflexibility" points by pointing to various decisions of this Court. Yet under the plain language of Title VII, as Judge Ebel pointed out, there is at least a jury question as to whether Abercrombie refused to hire Ms. Elauf because of what Abercrombie itself assumed was and would be her "religious ... practice" of wearing a headscarf. The majority's willingness to let Abercrombie escape any possibility of liability under Title VII for such blatant religious discrimination is a powerful reason for this Court to clarify the case law on which the majority relied in reaching that unfortunate and perverse conclusion.

CONCLUSION

The petition for certiorari should be granted, and the decision below reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

Interests and Description of Particular *Amici Curiae*

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents more than 76,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,400 congregations with more than 1.1 million members. Observance of the Sabbath is a central tenet of the Seventh-day Adventist church. The Adventist church has a strong interest in seeing that its members and all individuals of faith are protected from workplace discrimination.

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges and independent ministries in the United States. It believes that religious freedom is God-given, and that the government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be carefully maintained.

The Christian Legal Society (CLS) is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the religious liberty of all Americans is protected, regardless of the current popularity of their particular religious beliefs and conduct. Religious individuals' ability to pursue their livelihoods without forfeiting their religious beliefs and conduct, and without being discriminated against based on

those religious beliefs and conduct, lies at the heart of religious liberty.

The American Jewish Committee (AJC) is a global Jewish advocacy organization with over 175,000 members and supporters and was founded in 1906 to protect the civil and religious rights of Jews. AJC has strongly supported the principle that religious discrimination has no place in the workplace.

The Union for Reform Judaism includes 1.3 million Reform Jews in 900 congregations across North America, and (through its affiliate, the Central Conference of American Rabbis) more than 2000 Reform rabbis. The Union is committed to religious freedom, and believes Americans of all faith must be free to follow the dictates of their consciences when it comes to religious expression.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Founded on September 11, 2001, the Sikh Coalition works to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has successfully litigated cases on behalf of Sikh Americans who wear visible articles of faith, including turbans and unshorn hair (and beards), and have been denied employment or fired because of uniform or grooming policies and/or employers' claims of "lack of notice." Unlike some faiths where only the clergy are in uniform, all Sikhs are required to wear external articles of faith such as a steel bracelet (kara), uncut hair and beard (kesh), a

comb (kangha) to care for their hair, and a turban (dastaar) to cover their hair. Globally and in the U.S., these articles of faith distinguish members of the Sikh religion and make them instantly recognizable, similar to a person's race or sex. Through our years of work on behalf of the Sikh community, we have found that qualified Sikh applicants are at a severe disadvantage during the hiring process, unaware or uninformed of dress code or grooming policies, and frequently victimized by an employer's willful failure to engage in an interactive religious accommodation process.

KARAMAH: Muslim Women Lawyers for Human Rights is a nonprofit organization committed to promoting human rights globally, especially gender equity, religious freedom and civil rights in the United States. It pursues its mission through education, legal outreach and advocacy.

The American Islamic Congress (AIC) serves both Muslims and Non-Muslims through the promotion of civil and human rights, including religious freedom. Its programs have reached tens of thousands of people in 40 U.S. states and across the globe. AIC recognizes that American Muslims have prospered under this country's tradition of religious tolerance, and that American Muslims must champion and protect such tolerance for people of all faiths.